No. 22,026

In the

United States Court of Appeals

For the Ninth Circuit

JOHN A. METHEANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

Brief for Appellant

SHELDON GREEN
201 East Earll Drive
Phoenix, Arizona 85012

Attorney for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

TABLE OF AUTHORITIES CITED

No. 22,026

In the

United States Court of Appeals

For the Ninth Circuit

JOHN A. METHEANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Arizona

Brief for Appellant

JURISDICTIONAL STATEMENT

In September of 1962 the Appellant John A. Metheany was indicted on one count of concealment of assets in bankruptcy and four counts alleging the making of a false oath. He was indicted along with a co-defendant, G. Ronald Dotson, who was indicted for concealment of assets (not the same assets that the appellant allegedly concealed). In March of 1964 the Defendant and his co-defendant were convicted on all counts by a jury in Phoenix, Arizona, in the United States District Court for the District of Arizona. The co-defendant G. Ronald Dotson received a sentence of probation and the court sentenced the Defendant Metheany to two years in the custody of the Attorney General. The Defendant-Appellant Metheany was admitted

to bail pending appeal and did file a Notice of Appeal and did argue and have his counsel orally argue before this Court on June 7, 1965. The co-defendant Dotson did not appeal and has subsequently been released from probation. In August, 1966, this Court reversed the conviction of the District Court on the grounds that severance should have been granted in the first trial. See *Metheany v. United States of America,* 365 F.2d 90 (C.C.A. 1966). Subsequently, the Honorable William Mathes was assigned by this Court to preside at the trial. Prior to the trial and motion by the Appellant the concealment count was severed from the four false oath counts. The concealment count was tried by a jury before Judge Mathes on February 6, 1967 and continued until February 8, 1967, when the jury brought in a verdict of not guilty as to the concealment count. On February 8, 1967, the jury had been impaneled and was sitting in the case concerning the four counts of false oath, a violation of Title 18, U.S.C. Section 152. Before the conclusion of the trial, Judge Mathes declared a mistrial on February 10, 1967. The false oath counts case was reset for trial on July 17, 1967, and did go to trial. The case went to the jury for deliberation on the four false oath counts on July 19, 1967, and the jury returned a verdict of guilty as to three of the four false oath counts (Counts 3, 4 and 6 of the indictment) and not guilty as to Count 5 on July 20, 1967. The defendant waived time as to sentencing and was sentenced on July 20, 1967 at 2:00 P.M. The Defendant-Appellant was sentenced to the custody of the Attorney General of the United States for a period of two years for each of the counts as to which he was found guilty, the sentences to run concurrently. The Court further ordered that the Defendant was to become eligible for parole at such time as the Board

of Paroles may determine. The Court entered an order denying bail on the grounds that the appeal was frivolous and taken for the purpose of delay within the meaning of Sub-section 2 of Section A of Rule 46 of the Rules of Criminal Procedure. Subsequently this Court, the Ninth Circuit Court of the Court of Appeals, admitted the Defendant to bail and he is presently at liberty on bail.

This matter is before this Court pursuant to Title 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

Albert Sandoval was associated with Quality Upholstery in 1952 (Vol. 1, Page 23). Ron Dotson ran the business and Sandoval owned stock in the corporation (Vol. 1, Page 24). There was a meeting held in Mr. Metheany's office between Mr. Metheany, Ron Dotson, Albert Sandoval and his father, Ignacio Sandoval (Vol. 1, Page 24). They discussed the outstanding accounts of Quality Upholstery (Vol. 1, Pages 24-27), and Albert Sandoval ended up giving a check to Mr. Metheany for $5,800.00 (Vol. 1, Page 27). He received an accounting of the funds (Vol. 1, Page 29). Mr. Sandoval in all gave over Fifty Thousand Dollars to the corporation (Vol. 1, Page 33). The fall of 1960 Metheany visited Sandoval at his home in Gardenia. It would have been the 10th of December, 1960. Mr. Metheany told Sandoval that he, Metheany, was going to return some of the money on the Marko and Sun Drapery checks and he gave a check to Sandoval for $1,285.80 (Vol. 1, Pages 35-36). Sandoval testified that he sold the fifty per cent of the stock he owned (Vol. 1, Pages 44-45). There was a special meeting of the Board of Directors and a Note drafted on April 28, 1960. Sandoval testified something was said about selling it to Sally Dotson (Vol. 1, Page 47). Sandoval was willing to sell his stock to Sally Dotson

for $100.00 (Vol. 1, Page 49) and a Bill of Sale was drawn up by Metheany (Vol. 1, Page 49). Sandoval also testified that he got a promissory note from Sally Dotson for $100.00 (Vol. 1, Page 50). Government's Exhibit 13. Sandoval testified that he mailed the stock certificates back to Mr. Metheany (Vol. 1, Page 52). There is much confusion as to whether or not the stock certificate was actually mailed back (Vol. 1, Pages 57-58). Sandoval paid Metheany $750.00 for personally representing him and $750.00 for taking care of the claims (Vol. 1, Page 60). Sandoval was advised that there might be taxes unpaid and insufficient funds checks and liability for the labor and employees who had not been paid. The Bill of Sale for the stock was never located if indeed there was one (Vol. 1, Page 66).

Ira J. Bergman testified that he received a telephone call in June of 1960 from Metheany (Vol. 1, Page 68), relative to a corporate bankruptcy (Vol. 1, Page 69), and that he met Mr. Dotson in his office (Vol. 1, Page 70). Ira Bergman testified the schedules were brought to him all prepared (Vol. 1, Page 71). Mr. Bergman had no further contact with Mr. Metheany concerning these matters (Vol. 1, Page 72). Mr. Bergman never told Metheany that he was representing Quality Upholstery (Vol. 1, Page 72). Mr. Bergman further testified that he couldn't remember Mr. Metheany ever being present when he represented Quality Upholstery (Vol. 1, Page 73).

Bob Lukas testified that he is an attorney (Vol. 1, Page 76), that Metheany called him to be the receiver and trustee (Vol. 1, Page 77). Lukas was aware of checks that Metheany had written (Vol. 1, Page 78), and asked his attorney to get the checks from Metheany (Vol. 1, Page 79). A petition for turn over order was filed (Vol. 1, Page 79). The cancelled checks were turned over to Lukas as the result of

the hearing (Vol. 1, Page 84). Two photostatic copies of the checks were turned over to Lukas (Vol. 1, Page 85). These checks were admitted over objections (Vol. 1, Pages 85-86). 10-B is the Sun Drapery check and 10-A is the Marko Fabric check (Vol. 1, Pages 87-88). Lukas had discussed the existence of these two checks prior to receiving them (Vol. 1, Page 90).

Joe Miller testified that he is a lawyer (Vol. 1, Page 96). He knows the defendant (Vol. 1, Page 97), and a few weeks before the Petition in Bankruptcy was filed he contacted Mr. Metheany (Vol. 1, Pages 97-98).

Donald Elert testified that he is a salesman, or was a salesman and purchased furniture and drapes from Quality Upholstery. As late as May, 1960, he heard from Metheany about paying the bill (Vol. 1, Pages 102-103).

Beverly Jackson testified that she was a teller in the Bank (Vol. 1, Page 109) and knew the Defendant John A. Metheany. She testified that there was one item on the tape for $510.00 and one item for $138.74 (Vol. 1, Page 112).

Jim Thorpe testified that he was employed by the First National Bank (Vol. 1, Page 114). He testified that certain of these checks were microfilmed on both the front and the back (Vol. 1, Page 116).

Franklin Victor testified for the Government (Vol. 1, Page 124). He purchased accounts receivable from Quality Upholstery (Vol. 1, Page 125-126).

Jim Thorpe testified as to a deposit slip (Vol. 1, Page 127).

Richard F. North testified (Vol. 1, Page 134). He testified that Metheany gave him a check as part payment on the Quality Upholstery account (Vol. 1, Page 135), and that this was given to him on May 17, 1960.

Wilbur Myers testified that he received a check from Metheany dated May 18, 1960 (Vol. 1, Page 139).

Thomas Gearty, an F.B.I. Agent testified as to the $58,-000.00 in Trust Account checks (Vol. 1, Pages 145-154).

Ronald Dotson testified for the Government (Vol. 1, Page 188). Dotson testified that around April 29, 1960, he, Metheany, Sandoval and Sandoval's father arranged that Mr. Sandoval transfer the stock of Sandoval to Dotson's wife Sally for $100.00. Dotson then began to testify about the Sun Drapery and Marko Fabric's checks (Vol. 1, Page 198-202). These questions regarding the Government's Exhibits 10-A and 10-B which are the Marko Fabric and Sun Drapery's checks were asked and answered over the objection of counsel for the Defendant. (Vol. 1, Pages 198-200). The Court explained to the jury that the charge of concealment against Mr. Metheany was separated from the false oaths (Vol. 1, Page 207), and that the jury found him not guilty on the false oath cases (Vol. 1, Page 207). Ronald Dotson was called by the Government as a rebuttal witness and testified that Government's Exhibit Number 38, the Promissory Note in the amount of $1,000.00, was payable to Mr. Frank Graff (Vol. II, Page 321). This particular Exhibit and the testimony concerning it is particularly important because it links Metheany with Dotson by showing the borrowing of the funds from Graff in order to pay Sandoval back the $1,285.80. Exhibit Number 38 was admitted into evidence over the objection of the Defendant's counsel (Vol. II, Page 316). This is a particularly damaging and prejudicial exhibit.

SPECIFICATIONS OF ERROR

1. The Court erred in refusing to grant Defendant's requested instruction Number 4 which reads as follows:

> "You are further instructed that due to the fact that there is no evidence in this case that the stock certificates were transferred on the stock register books

of the corporation, that there was no purchase and sale agreement for the stock and that there is no evidence that the stock was properly endorsed and new stock certificates issued. Therefore, you are instructed that there was not a valid and legal transfer of stock from Albert Sandoval to Sally Dotson."

The instruction refused was objected to because there were not facts sufficient to show that there was a valid and legal transfer of the Sandoval stock as implied in the indictment (Vol. 3, Page 399).

2. The court was in error in not granting defendant's requested instruction Number 1 which reads as follows:

"You are further instructed that there can be no lawful conviction in a false oath case such as this when an answer of the defendant under oath to a question propounded to him is literally accurate, technically responsive or legally truthful."

The objection to the court's refusal to grant this instruction was made on Page 399.

3. It was plain error for the defendant to be charged as he was in counts three and four of the indictment as those counts are contradictory of each other and furthermore amount to semantical dichotomys.

4. It was error for the court to admit evidence relating to the alleged crime of concealment of assets.

ARGUMENT I

The Court's refusal to grant Defendant's Requested Instruction Number 4 constituted reversible error and requires a new trial. This argument goes to Count VI of the indictment where the Defendant-Appellant Metheany was asked:

"to whom did he dispose of his stock?"

and the Defendant gave the answer:

"I don't know your honor."

Defendant's Requested Instruction Number 4 reads as follows:

> "You are further instructed that due to the fact that there is no evidence in this case that the stock certificates were transferred on the stock register books of the corporation, that there was no purchase and sale agreement for the stock and that there is no evidence that the stock was properly endorsed and new stock certificates issued. Therefore, you are instructed that there was not a valid and legal transfer of stock from Albert Sandoval to Sally Dotson."

The objection to the refusal to grant this instruction is in Volume III, Page 399. There is no evidence whatsoever to indicate that Albert Sandoval's stock certificate was endorsed; in the prior trial he testified he really couldn't remember what happened to the stock certificate and at the present trial he testified that he sent it to Metheany (Vol. 1, Pages 57-58). Metheany testified that he did not have the stock register book, that he did not have the stock minute book (Vol. II, Page 268). Sally Dotson did not testify that she received a new stock certificate or the old stock certificate. There was no new stock certificate issued and although Sandoval testified about a Bill of Sale, none was introduced. Therefore, since the stock certificate itself was not introduced there was no evedince that it was endorsed, nor is there any evidence that same was delivered. Yet the Court refused to grant Defendant's Requested Instruction Number 4. Arizona has the Uniform Stock Transfer Act. Art. 10, Sec. 231 of the Arizona Revised Statutes reads as follows:

"Transfer of certificates and shares.

A. Title to a certificate and to the shares represented thereby can be transferred only:

1. By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be owner of the shares represented thereby.
2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the certificate, or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.
3. The provisions of this Section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provides that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by registrar or transferred by a transfer agent."

There was certainly no evidence at the trial that the Defendant-Appellant Metheany was a registrar or a transfer agent of the corporation even if he did receive the stock certificate from Sandoval of which there is no evidence. The provision of the Uniform Stock Transfer Act that title to stock can be transferred "only" by endorsement of the certificate or by a separate written assignment makes one or the other necessary to effectuate a transfer of title to the stock. *Longworth v. East River National Bank,* 160 App. Div. 737, 145 N.Y. State 1051. Affirmed 220 N.Y. 718, 116 N.E. 1058. Uniform Stock Transfer Act, Art. 1, 10-231 ARS.

It has been held that under the provisions of the Uniform Stock Transfer Act delivery of the certificate is essential to a transfer of the legal title to the stock. *Brennan v. W. A. Wills, LTD.* (C.A. 10 Colo.) 263 E.2d Certiori denied 360 U.S. 902, 3 L.Ed.2d 1254, 79 Sup. Ct. 1284; *Johnson v. Johnson,* 300 Mass. 24, 13 N.E.2d 788.

ARGUMENT II

The Court was in error in not granting Defendant's Requested Instruction Number 1. In vol. 3, Page 399 of the Transcript the Defendant-Appellant made timely objection to the Court's refusal to grant Defendant's Requested Instruction Number 1. Defendant's Requested Instruction Number 1 reads as follows:

> "You are further instructed that there can be no lawful conviction in a false oath case such as this when an answer of the Defendant under oath to a question propounded to him is literally accurate, technically responsive or legally truthful."

Certainly that particular instruction was applicable in this case as to the three counts on which the Defendant was found guilty gecause the Defendant's contention always was that these answers given by him were legally truthful, literally accurate and technically responsive. This Defendant's Requested Instruction Number 1 is certainly an applicable rule of law as laid down in *Smith v. United States,* (C.C.A. 6, 1948), 169 F.2d, 118, at page 121. There the Court said:

> "There can be no lawful conviction in a perjury case when an answer of the Defendant under oath to a question propounded to him is legally, truthful, technically responsive or literally accurate."

This Court has always applied that principle. See *Hart v. United States* (C.C.A. 9, 1942) 131 F.2d 59 at Page 61.

ARGUMENT III

Argument III was plain error according to Rule 52b of the Federal Rules of Criminal Procedure, that this Court noticed the plain error as to the contradiction in the indictment and the impossibility of the Defendant defending himself against Counts III and IV of the indictment. Count III of the indictment is essentially that Mr. Metheany gave a false answer when in response to the question "Mr. Metheany do you recall the approximate date that you ceased to act as an attorney for Quality Upholstery, Inc.", he said the approximate date would be the first of March. The indictment charges when in truth and in fact as he then well knew he continued to be attorney for Quality Upholstery until on or about June 1, 1960. In Count IV of the indictment he was charged with perjury because he said he only knew that it was Ira Bergman that was the attorney for that period of time and that was only through hearsay. He had no personal knowledge of this. Well, it's very simple, the Government introduced a great deal of evidence to show that it was Ira Bergman who was the attorney for the bankrupt prior to June, 1960 when the company filed bankruptcy. The Government also introduced evidence that it was Metheany who was the attorney. Therefore, this was the type of question; when did you quit beating your wife last week, because it was impossible for both of them to have been the attorney at the same time and therefor it was impossible for both of them to have been the attorney at the same time and therefore it was impossible for him to defend himself against these charges. This Court has the authority to notice this as plain error according to *Silber v. United States,* 1962, 370 U.S. 717, 8 L.Ed.2d, 798, 82 Sup. Ct. 1287.

ARGUMENT IV

Evidence Relative to the Crime of Concealment, of Which the Defendant Was Acquitted, Was Improperly Admitted in the Defendant's Perjury Trial

The underlying doctrine of law upon which this argument rests is concisely set forth in *Hurst v. United States,* 337 F.2d 678 (5th Cir., 1964)

> "There probably is no better known rule of common law criminal practice than that Courts are careful to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."

This rule secures the Defendant's right to be tried for a specific crime based upon evidence relevant only to that crime, having for its underpinnings the concept of fundamental fairness. This basic proposition has been eroded by two basic exceptions. The first exception is the use of a prior conviction for impeachment purposes. The second exception to the rule excluding evidence of other misconduct by the Defendant permits such evidence where the basic purpose for the introduction of such evidence is the proof of an essential element of the crime and such evidence incidentally implicates the Defendant in other wrongdoings. For example, in *DeVore v. United States,* 368 F.2d 396 (9th Cir. Ct. of Appeals 1966), this Court said

> ". . . and it is axiomatic that evidence which tends to prove a material fact may be admitted even though it also discloses the commission of an offense other than the one charged."

The record clearly indicates in the instant case that the questioned evidence was not adduced for the purposes of impeaching the Defendant. We must then view the evidence to determine whether it comes within the stated

exception, i.e., whether the evidence proves a material allegation of the crime charged. None of the perjury counts relate to the concealment of assets. He was not charged with a false oath that he denied concealing assets. In *Diaz-Rosendo v. United States,* 364 F.2d 941 (9th Cir. Ct. of Appeals, 1966), the Defendants appealed from a conviction of a conspiracy to violate the laws of the United States, particularly to defraud the United States by importing marijuana into the United States from Mexico; failing to declare marijuana at the border and to conceal the transportation of marijuana which had been imported into the United States and secondly charge the appellants with aiding and abetting one Murrillo to smuggle marijuana into the United States.

The relevant facts are that on January 24, 1965, an automobile in which three persons other than the Defendants were riding was stopped and searched at the border and marijuana was found therein. Also found in this car was the address of the Hollywood Center Motel. All of the marijuana except one package was removed from the car and the customs agent drove the car to Los Angeles with one of the original passengers. In Los Angeles the customs agent was replaced by a Federal Bureau of Narcotics agent, who drove the automobile in the company of Murrillo to the Hollywood Center Motel. The defendant approached the car at which time the passenger Murrillo had a conversation with Diaz-Rosendo, which conversation indicated that Diaz-Rosendo had the money apparently to make a purchase. As the defendants walked away from the automobile toward an arranged meeting, they were arrested.

On the following day, the automobile in which the defendants had arrived at the scene was searched and a small

quantity of marijuana was discovered therein. The evidence concerning this marijuana was strongly objected to at the trial. The introduction of this evidence was found by the Court to require reversal and held "We do not see how, or in what manner, it can be said that whatever crime may have been committed in the possession, transportation, or concealment of such marijuana, it in any way relates to or tends to prove the commission of the separate and distinct crimes set forth in the indictment. The general rule is well established in this circuit, as elsewhere, that when a defendant is on trial for a specific offense, evidence of a distinct offense unconnected with that charged in the indictment is not admissible." *White v. United States,* 192 F.2d 595, 13 Alaska 513 (9th Cir., 1951); *Bowie v. United States,* 345 F.2d 605 (9th Cir., 1965).

Applying this rule to the instant case, Appellant must confess that he is unable to determine any material allegation of the charges on which he was tried which were proved by the admission of the evidence complained of. After counsel for Appellant again asked for the removal of 10a and 10b, the Court said they were introduced for the limited purpose of showing state of mind (Vol. II, Page 335). In *Buatte v. United States,* 350 F.2d 395 (9th Cir., 1965), the Defendant was subsequently charged with the murder of another person and evidence concerning the first murder was introduced at the second trial. In applying the exception to the general rule stated above, the Court stated "The evidence that Buatte shot Alice Sucotti was part of the overall occurrence. Moreover, even though the murder conviction was set aside and an acquittal entered, the evidence that Buatte shot Alice Sucotti was relevant to show that his shooting of Dan Sucotti was not a mistake

or accident, and it was relevant to the issue of intent." While Appellant disagrees with the premise of this finding, i.e., that an acquittal is not a bar to the use of evidence in a subsequent trial as a circumstance showing guilt, see *State v. Little,* 87 Ariz. 295, 350 P.2d 756 (1960), Appellant does agree that the evidence offered and objected to in the *Buatte* case was relevant in that this evidence indicated that the defendant had not shot Dan Sucotti by mistake or accident, nor did he do it unintentionally.

We strongly urge this Court, in examining the instant case, to compare it with the facts in *DeVore v. United States, supra.* It is obvious from such a comparison that the conclusion reached in *DeVore,* that such evidence was prejudicial and required reversal, must be the identical conclusion reached in the instant case.

When such an examination of the evidence in the instant case is made and the conclusion arrived at that the prejudice to the defendant far outweighed the benefit to the prosecution, the additional fact is added that this defendant was acquitted of the crime of concealment, it becomes increasingly clear that the evidence should not have been admitted. See *State v. Little, supra,* at page 763 of the Pacific Reporter. The Arizona Supreme Court held, in *State v. Little, supra,* "the fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant's bad character and criminal potencities, lowers the scale on the side of inadmissibility of such evidence." The Arizona Supreme Court went on to say, at page 764 of the Pacific Reporter, "the verdict of acquittal should relieve the defendant from having to answer again, at the price of conviction for that crime or another, evidence which amounts to a charge of a crime of which he has been

acquitted." The Tenth Circuit Court of Appeals in *Welch v. United States,* 371 F.2d 287 (1966), propounded the following statement, at page 293 of the Federal Reporter, "evidence of the commission of crimes not charged, as such, is not admissible; evidence of unlawful conduct material to the crime charged should not be admitted if its admission diverts the case into a 'trial within a trial' and in actuality exposes defendant to a conviction for a crime not charged." Appellant believes that this is precisely what occurred at his trial in the Court below. The defendant was not only required to defend for perjury charges, but was also required to defend for a second time the concealment count, a procedure which the defendant believes to be fundamentally unfair.

In applying this balancing test to determine the admissibility of evidence, this Court determined in *Reed v. United States,* 364 F.2d 630 (9th Ct. App. 1966), that the defendants who were charged with three counts of transporting kidnapped persons in interstate commerce were not erroneously convicted based upon evidence showing that they had, immediately preceding the kidnapping, engaged in armed robbery. The evidence clearly explained the motive for the kidnapping and was, therefore, properly admitted as evidence. With this holding we agree, but again point out to this Court that the admission into evidence of testimony in documents relating to certain checks described in the concealment count, of which the defendant was acquitted, could not in any way shed light or prove any of the elements in the charges of perjury, were extremely prejudicial to the defendant, and would require reversal by this Court.

CONCLUSION

Therefore, we request that a judgment of acquittal be entered and the sentence set aside or in the alternative that a new trial be granted for the trial court's error in refusing to give certain instructions and for the erroneous admission of evidence.

Respectfully submitted,

SHELDON GREEN

Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with those rules.

SHELDON GREEN

Sheldon Green

Appendix

Exhibit Number 10-A	Introduced into evidence Page 86
Exhibit Number 10-B	Introduced into evidence Page 86
Exhibit Number 38	Marked for identification Page 300 and introduced into evidence Page 316